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No. 87-931

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THEODORE S. PROUD, JR.,

Petitioner,

vs.

GREYCAS, INC., a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ORAL ARGUMENT REQUESTED

SCHNEPP & BARNES-PRINTERS, INC., SPRINGFIELD, ILL.

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STATEMENT OF FACTS

Petitioner's Statement of the Case is a lengthy dialogue dealing with the loan transaction and the parties involved. It contains inaccuracies and innuendo drawn from incomplete statements, all of which fade into insignificance when the case is placed in its proper perspective.

This was not a suit to recover the balance due on the loan. If it were, the lengthy recitation of facts by Petitioner might be pertinent. Rather, this was a suit to recover the value of collateral lost as a result of Respondent's reliance on the opinion letter of Petitioner.

The basic facts can be stated more simply. On March 11, 1981, Greycas, an Arizona company, entered into a Loan and Security Agreement with one Wayne D. Crawford, of Vandalia, Illinois, pursuant to which, Greycas agreed to loan Crawford the sum of $1,367,966.50. Collateral for the loan consisted of farm machinery and equipment comprising a three-page list, having an appraised value in excess of the loan amount. The Agreement provided that Crawford should deliver to Greycas a favorable opinion of his independent legal counsel in the form attached to the Agreement as an exhibit, assuring that title to the collateral was free and clear and that a perfected UCC-1 filing on behalf of Greycas was a first and prior lien.

(Much is made by Petitioner of the assertion that Respondent's Credit Committee ordered its own attorney to conduct the title search and that he unilaterally decided to rely on the title opinion of Petitioner. The Credit Committee merely documented by minute that the title search was a requirement of the loan and that it should be taken care of by the Legal Department. There was competent testimony in explanation of the minute and that the Legal Department did take care of it in accordance with its usual procedure, which was to have the borrower secure independent counsel for that purpose, as provided in the loan documents.)

Crawford engaged the services of Defendant Proud, an attorney who conducted his practice in Schaumburg, Illinois, to furnish the opinion letter. The opinion letter was on the stationery of Proud's firm, addressed to Greycas's parent company, dated March 19, 1981, and attached to it was the three-page list of farm equipment and machinery, the condition of title to which was the subject of the opinion letter. Proud testified that, in signing the opinion letter, he did so in reliance upon the statements and representations of Crawford, who was also an attorney, that everything had been taken care of, that a search had been made of the records, and that the UCC filing (on behalf of Greycas) had been made as shown by the letter.

Proud further testified that he knew that Crawford was obtaining a loan from Greycas and that Greycas would rely upon his opinion to the effect that title to the collateral was clear and that Greycas had a perfected security interest in the collateral.

Upon being furnished with the opinion letter of Proud, and verifying that he was a member in good standing of the Illinois Bar, and upon satisfaction of other provisions of the Loan and Security Agreement, Greycas made the loan to Crawford. When default occurred a year later, a number of state-court actions involving liens against Crawford's farm machinery and equipment were consolidated and tried before the Circuit Court of Fayette County, Illinois, which entered a Judgment determining the relative priority rights of the lien claimants. Greycas' claim to any of the items for which Judgment was entered in this case was extinguished by the Fayette County Judgment.

Crawford was the brother-in-law of Proud, a fact not disclosed to Greycas and of which it had no knowledge until default. It was clearly established at trial that Respondent had no cause of action against the borrower's wife since her name and that of the notary taking her acknowledgement were forged on the loan documents. Equally clear was the fact that she would retain her life insurance proceeds subject only to the claim of the Internal Revenue Service under transferee rules, that no part of the insurance proceeds would inure to the benefit of the estate or its creditors, and that there were no assets in the estate to satisfy the claims of creditors such as Greycas.

ARGUMENT

I.

The question of when a non-client may maintain suit against an attorney involves only state law.

Petitioner poses the question of whether the decision in *National Bank v. Ward*, 100 U.S. 195 (1878), which required privity of contract in order to maintain a suit against an attorney, is still a viable decision and whether it should be followed in the case at bar.

Whether *National Savings Bank v. Ward* is still a viable decision is immaterial to the resolution of this case since that decision merely interpreted the law of the District of Columbia as it existed over 100 years ago. That decision in no way created any federal rule. The fact that some states have elected to follow it while others, including Illinois, have elected otherwise, (*Pelham v. Greisheimer*, 91 Ill.2d 13, 440 N.E.2d 96 (1982)) does not furnish grounds for certiorari. Rule 17.1(a), Supreme Court Rules.

In any event, the facts of *National Savings Bank v. Ward* are distinguishable from this case. In *National Savings Bank v. Ward*, Mr. Chapman retained the services of Mr. Ward to ascertain whether Mr. Chapman had clear title to a certain piece of real estate. Mr. Ward had no knowledge that the title opinion was to be given to anyone else or to be used for any purpose other than for information to Mr. Chapman. The Court makes specific reference to this distinctive feature where it said:

> "*. . . and the case shows that the service was performed for a third person without any knowledge that the certificate was to be used to procure a loan from the injured party.*"

In contrast, Petitioner in this case knew from the outset that the purpose of his title opinion was to enable the borrower to secure a loan from Respondent and the title opinion was specif-

ically addressed to Respondent. Petitioner also knew that Respondent would be relying on his title opinion in making its decision of whether borrower should receive the requested loan.

Because the decision in *National Savings Bank v. Ward* was not based upon any United States' constitutional provision, or federal rule, this Court should decline to exercise its supervisory authority.

II.

The Court of Appeals did not depart from *Erie v. Tompkins.*

Petitioner's attempt to invoke the doctrine of *Erie RR Co. v. Tompkins*, 304 U.S. 64, is a circuitous effort to create a federal question where none exists. The injection of this doctrine where the underlying state law and facts of this particular case are not supportive of Petitioner's position is nothing more than an attempt to boot-strap Petitioner into the arena of federal law.

A. The duty is established by the court of last resort of the State of Illinois.

Petitioner states that the Seventh Circuit and the District Court disregarded what he claims to be the adversarial posture of the parties, which he contends negates the duty in this case. The opinion of the Seventh Circuit Court of Appeals belies this contention (Pet.App.4a). The Court there considered the argument that Greycas had an adversarial relationship with Proud's client, and that a lawyer has no duty of straight dealing to an adversary, and it was Proud's argument in his Brief in that Court that led to the dissertation by that Court on the question of negligent misrepresentation vis-a-vis professional malpractice.

But, to avoid the authority of *Pelham v. Greisheimer*, 92

Ill.2d 13, which establishes the duty, Petitioner quotes from that case (p. 23):

> "*In cases of an adversarial nature, in order to create a duty on the part of the attorney to one other than a client, there must be a clear indication that the representation by the attorney is intended to directly confer a benefit upon the third party.*",

and then argues that Respondent was, at most, an incidental beneficiary. The Seventh Circuit Court's opinion furnishes the complete answer to that argument at Pet.App.5a, where, after restating the proposition quoted from *Pelham*, it said:

> "*That, however, describes this case exactly. Crawford hired Proud not only for the primary purpose, but for the sole purpose, of influencing Greycas to make Crawford a loan.*" (Underscoring ours.)

The remaining Illinois cases cited by Petitioner enunciate different principles of law, or are clearly distinguishable on their facts. Suffice it to say that none holds that the parties to a loan transaction are in an adversarial position, nor does any contain a holding opposite to that of the Seventh Circuit in this case.

B. Respondent had a clear right to rely on Petitioner's opinion letter addressed to it.

Petitioner next argues that Respondent had no right to rely on Petitioner's opinion letter because (1) it had a duty to make inquiry as to the truth of the representations, and (2) UCC statements are public records and Respondent had equal access to the Recorder's office.

The cases cited by Petitioner in support of the first proposition have no application because they deal with fraudulent misrepresentation and not professional malpractice.

With respect to the second proposition, the case of *Chas. Hester Enterprises, Inc. v. Ill. Founders Ins. Co.*, 114 Ill.2d 278, simply held that state Statutes are matters of public record and

all persons are presumed to know their contents.[1] That is a far cry from the condition of a record title to be evidenced by a title opinion.

Again, the Seventh Circuit Court decided no federal question in conflict with a state court of last resort.

C. Petitioner's argument regarding damages is contrary to the evidence.

The points raised here are factually inaccurate and are answered in Respondent's Statement of the Case. Petitioner had no pending or viable action against the borrower's wife for the reasons shown by the evidence that her signature and that of her Notary on the loan documents were forgeries. Nor was a claim against the estate of the borrower of any value, for there were no assets in the estate to satisfy same, excepting as to two isolated pieces of farm equipment still in dispute, which were not included in the Court's assessment of damages. (Dist. Ct. Findings of Fact, Pet.App.22a.) Again, the argument about the availability to the estate of insurance proceeds is factually inaccurate. Clearly, the Findings of the District Court and the holding of the Court of Appeals on this element were not in conflict with any case of the Supreme Court of the State of Illinois.

III.

The prior state court Judgment.

It simply is not true that the prior state court Judgment was given preclusive effect. At no time during the trial of this case did Respondent ever assert the doctrine of res judicata or collateral estoppel with respect to the judgment of the Fayette County Circuit Court which determined the priority of the liens on the property in question. At no time did Respondent

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1. In its holding to this effect, the *Hester* court was dealing with an issue of fraudulent concealment.

assert that such judgment was conclusive as to Petitioner or that he was precluded from contesting the issues or result of that case. And the Court so ruled during the trial. Nor did the Court, in its Findings and Conclusions, invoke the doctrine or rely on it. It merely stated that "The effect of the judgment . . . was to establish prior security interests in the collateral. . . ." (Pet.App.2a)

The Federal Full Faith and Credit statute, 28 U.S.C., Section 1738, reads in pertinent part:

> "*Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.*"

In *Pile v. McBratney*, 15 Ill. 314, the Court said at p. 320:

> "*It is true, as a general rule, that a judgment or decree only binds parties and privies; and that, as against strangers, the record is only evidence of the fact that the judgment or decree has been pronounced, and of the legal consequences resulting from that fact.*" (Underscoring ours.)

The Court in *Illinois Steel Co. v. Indus. Com.*, 290 Ill. 594, affirms the proposition that a stranger may be affected by a judgment in a proceeding in rem. The Fayette County proceeding was unquestionably an in rem proceeding. It operated directly on the property affected. More importantly, Respondent submitted the Fayette County Judgment only to prove the legal consequences of its rendition. The Judgment was not offered to preclude Petitioner from relitigating any of the matters involved in that case, to do which he had full opportunity. The legal consequences of that judgment simply established *prima facie* or presumptively that Respondent did not have a first and prior lien on the collateral in question, as set forth in Defendant's opinion letter. No proof was offered in contravention, or to overcome this prima facie effect, nor did

the Seventh Circuit Court here decide a Federal question in conflict with a state court of last resort.

Moreover, and apart from the State Court Judgment, the Court admitted into evidence the records of the Recorder of Deeds of Fayette County, which showed that Respondent had no first and prior lien on March 19, 1981, covering the equipment put up as collateral, contrary to the statement of Petitioner in his opinion letter.

CONCLUSION

This was a diversity action in which the District Court and Seventh Circuit Court of Appeals followed and applied the substantive law of the State of Illinois. No federal question was presented, nor decided in a way in conflict with a state court of last resort. There is no call for an exercise of this Court's power of supervision.

Respectfully submitted,

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